

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

341

No. 23,170

UNITED STATES OF AMERICA

v.

GORDON ALEXANDER
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
For the District of Columbia

BRIEF FOR APPELLANT

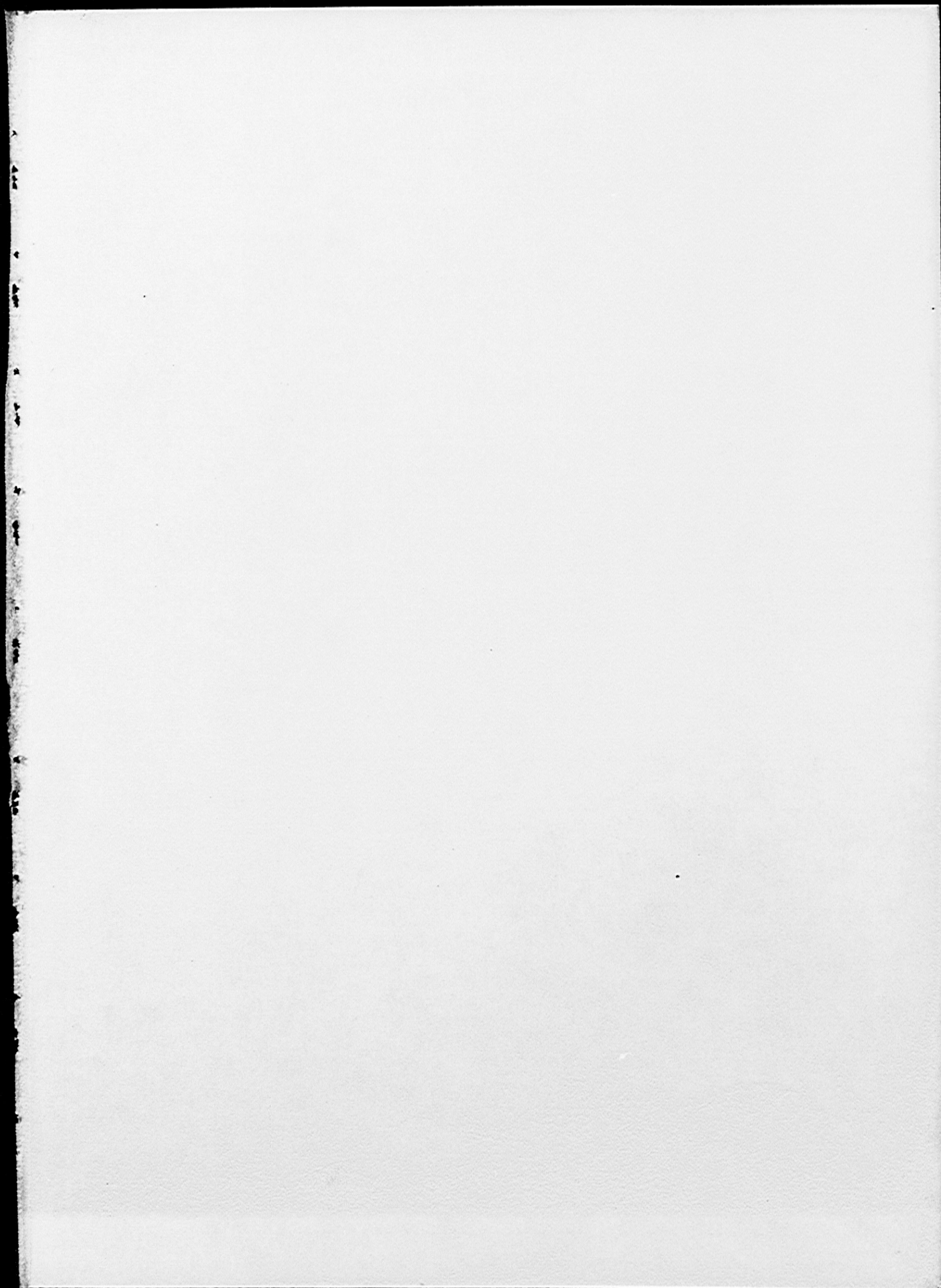
United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 18 1969

Nathaniel S. ...
CLERK

Dorsey Evans
Attorney for Appellant
Suite 711
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036

George O. Ackerman
Attorney for Appellant
Suite 711
1025 Connecticut Ave., N.W.
Washington, D. C. 20036



STATEMENT OF ISSUES

- I. Whether there was sufficient evidence introduced at trial to justify a verdict against Appellant on four counts of assault?
- II. Whether the act, standing alone, of pointing a dangerous weapon at a group of persons constitutes one assault or an assault of each individual in the group? (In submitting this issue, Appellant in no way waives his contention that he did not point the gun at the group involved in this case.)

This case has not been reviewed previously by the United States Court of Appeals.

No reference to rulings or pleadings is made in this brief.

TABLE OF CONTENTS

	<u>Page</u>
Statement of Issues.....	i
Statement of Case.....	1, 2, 3
Relevant Facts and Transcript Pages.....	4
Argument: Issue I.....	5, 6, 7, 8, 9, 10
Issue II.....	10, 11, 12, 13, 14
Conclusion.....	15

CASES

BELL v. UNITED STATES (1955) 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905.....	13
CHAMCOCK v. UNITED STATES (1920) 50 App. D.C. 54, 267 F. 612, 11 A.L.R. 79.....	12
HENRY v. UNITED STATES (1919) 49 App. D.C. 207, 263 F. 459.....	12
HOILES v. UNITED STATES (1879) 3 MacArthur (10 D.C.) 370, 36 Am. Rep. 106.....	12
*LADNER v. UNITED STATES (1958) 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199.....	10
UNITED STATES v. BEEPMAN (1838) 5 Cranch C.C. (5 D.C.) 412, Fed. Cas. No. 14,560.....	12

STATUTES

D. C. Code, Chapter 22 Section 502.....	11
Section 2405.....	11
U. S. Code, Chapter 18 Section 111.....	10

OTHER AUTHORITIES

	<u>Page</u>
Annotation: 28 A.L.R.2d.1182.....	13
11 P.C. Code Encyclopedia.....	12
2 Wharton's Criminal Law & Procedure (1962).....	13

STATEMENT OF CASE

On or about June 5, 1968, in the early hours of the morning, Appellant and two male Negro companions were seated at the counter of the Little Tavern hamburger shop at 3331 "M" Street, N. W., when five U. S. Marine officers and a young lady -- all Caucasian -- entered. While the new arrivals ordered food, one of the Marines and Appellant exchanged stares, but no words. Shortly thereafter, Appellant and his two companions got up from their seats and started to leave. On the way out a verbal exchange ensued between Appellant and the Marine with whom he had earlier exchanged stares -- Lieutenant Ellsworth R. Kramer. At this point, Appellant stood with his back to the door of the hamburger shop and the Marines formed a semi-circle facing him. After the verbal altercation between Appellant and Lt. Kramer a second Marine, Lieutenant William King, approached Appellant and said -- according to the testimony of Lt. Kramer in the District Court -- "What you goddamn niggers want?" Appellant, seeing all the Marines moving toward him, feared physical assault and pulled a .38 caliber pistol out of his pocket and pointed it at Lt. King.

One of Appellant's companions, Benjamin Murdock, who (unknown to Appellant) had been standing behind him, then drew his own pistol and began shooting wildly. He fired five or six shots, killing Lt. King and a second Marine, Lieutenant Thaddeus Lesnick, and wounding Lt. Kramer and the young lady,

Miss Barbara Kelly. At no time did Appellant fire his gun.

Appellant, Murdock and the third Negro, Cornelius Frazier, Jr., then went outside and entered Appellant's car which was parked nearby. Appellant, who was driving, laid his pistol down on the seat of the car. Murdock, according to his own testimony corroborated by the testimony of eyewitness, Louis Albach, picked up Appellant's gun and fired it three times out the car window. When the defendants were apprehended shortly thereafter, police found only three spent casings in the chamber of Appellant's pistol. F. B. I. ballistic Robert M. Zimmers testified at trial that all the bullets which were found to have been fired in the Little Tavern -- save that embedded in the body of Miss Kelly and not extracted -- were fired from the gun identified as Murdock's. These include the bullets taken from the bodies of Lts. King and Lesnick and the one which wounded Lt. Kramer. Zimmers further testified that of the three spent shells found outside, two positively came from Appellant's gun and the third -- though too damaged for positive identification -- came from the same type gun as Appellant's. These were the shells expended when Murdock fired Appellant's gun three times from inside the car.

On indictment was returned against Appellant, Murdock and Frazier, Jr. on the charge of murder.

Appellant was charged by the Grand Jury (the indictment was signed only by the foreman) with two counts of first degree murder (changed during the trial by the Court to second degree murder) four counts of assault with a dangerous weapon and with carrying a dangerous weapon. 22 D. C. Code 2401 (later 2403), 502 and 3204. Appellant was acquitted on the first two counts and found guilty on the latter five. He was sentenced to two to ten years for assaults with a dangerous weapon on Lt. Kramer and Miss Kelly, the terms to run consecutively; one to three years for assaults with a dangerous weapon on the other two Marines in the group, Lieutenants Daniel H. LeGear, Jr., and Frank R. Marasco, the terms to run concurrently but consecutively to the first two terms; and one year for carrying a dangerous weapon, the term to run concurrently with the above. This makes a total sentence of five to twenty-three years.

The only statute involved in this appeal is D. C. Code (1967) 22-502, Assault with intent to commit mayhem or with dangerous weapon. Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, Sec. 804.)

FACTS AND TRANSCRIPT PAGES RELEVANT TO ISSUES ON APPEAL

Testimony relevant to the contention that Appellant at no time assaulted Lts. Kramer, LeGear and Marasco, and Miss Kelly, quoted or referred to in this brief, can be found on the following pages of the transcript:

25, 27, 198, 75, 56, 30, 31, 176, 177, 234, 222,
233, 126, 435, and 175-6.

ARGUMENT

It is Appellant's contention (1) that each of the four assault convictions should be reversed for lack of any supporting evidence, and (2) in the alternative, the Court should find as a matter of law that if an individual points a dangerous weapon at a group of persons, that is a single act and constitutes only one assault.

In his instructions to the jury, the trial judge gave the following charge for assault under D. C. Code (1967) 22-502:

"To point a dangerous weapon at another person in a menacing or threatening manner, or in any manner that would reasonably justify the other person in believing that the weapon might be immediately used against him, constitutes assault with a dangerous weapon." (Supplemental Transcript, p. 209.) (Emphasis added)

(1) The testimony below, when sifted of its contradictions, clearly shows that Appellant pointed his gun only at the deceased Lt. King, that he spoke only to Lt. King while he had the gun in his hand and that at no time did he give any of the alleged assault victims reason to believe that his gun might immediately be used against him or her.

Lt. Kramer, by his own testimony and that of his compatriots the closest to Appellant and Lt. King, testified as follows:

"At that point Alexander...pulled out a .38, cocked it....[and] (p)ointed the gun into his chest."

Prosecutor - "Into the chest of King?"

Kramer - "The chest of Bill King."
(Page 25 of Transcript)

Kramer - "His [Alexander's] arm was extended. The barrel almost touched Bill's chest. And, at the time he pulled out the gun, he said, 'I will show you what I want.'" (According to Lt. Kramer, Lt. King had, immediately preceding this incident, asked Appellant: "What you goddamn niggers want?" Lt. Marasco said at page 198 that Lt. King's statement was, "What the hell do you dirty nigger bastards want?") (P. 27)

(Cross-examination) Kramer - "He [Appellant] extended his arm and fist -- his pistol until it almost touched Bill's chest." (P. 75)

Court - "Alexander was not moving?"

Kramer - "No, Alexander was standing fast. He was extending his arm and pistol into Lt. King's chest." (P. 76)

Questioned as to whether any gun was pointed at anyone else, Lt. Kramer testified as follows:

Prosecutor - "Do you know whether or not either one of them [Appellant or Murdock] pointed the gun at Barbara Kelly?"

Kramer - "Yes, THEY did point the gun at Barbara Kelly. She was next to me and in the line of fire." (Emphasis added) (P. 30)

Lt. Kramer at no time stated that Appellant specifically pointed his gun at either himself or Miss Kelly, he said that he did not know which of the two defendants fired the shots that followed, and the ballistics expert testified that Lt. Kramer was shot with Murdock's gun and all evidence showed that Appellant's gun was not fired inside

the Little Tavern.

Prosecutor - "All right. What about the others. Marasco -- did you notice whether either one of them pointed their weapons at him?"

Kramer - "No, I didn't see any weapons pointed at Krank-Marasco." (P. 21)

Lt. Marasco testified below in this manner:

Prosecutor - "With respect to Mr. Alexander, did you notice who, if anyone, he may have pointed the gun at?"

Marasco - "Yes sir. I think he had pointed...."

Objection.

Court - "The question is, did you notice?"

Marasco - "It was in the direction of Lesnick. He had pulled it so that he faced him squarely in the chest." (P. 176)

Prosecutor - "Who else did he Appellant point the gun at, if you recall?"

Marasco - "I can't recall." (P. 177)

It might here be suggested that the prosecutor put the answer in Lt. Marasco's mouth, the question clearly implying that Appellant did indeed point the gun at someone else and if Lt. Marasco doesn't remember, its because he had faulty recollection and not because it never happened.

Lt. LeGear, the last of the three surviving Marines, testified as follows:

"(H)e Appellant pointed the gun in the general direction of Kramer, Lesnick and King." (P. 234)

Appellant was not charged with assault against the deceased lieutenants King or Lesnick and Kramer himself

10

did not testify specifically that Appellant pointed his gun at him.

Lt. LeGear also testified that after the first shooting, when all the defendants had left, an arm reached in the door and pointed a gun at him. However, he stated on page 222 that he couldn't identify whose arm it was, and said on page 223 that he couldn't tell if it was pointing at anyone else. Lt. Kramer identified the arm as Murdock's on page 30.

Miss Kelly's testimony on these points indicate clearly a confusion in her mind as to what actually took place:

Prosecutor - "Now, who was he Appellant pointing it at, do you remember?"

Miss Kelly - "He was pointing it in the direction of Lt. Kramer."

Prosecutor - "All right. And at the time you say he fired the gun, who was it pointed at then?"

Miss Kelly - "Lt. Kramer and myself."

Prosecutor - "Did he point it at anyone else?"

Miss Kelly - "Not that I remember." (P. 126)

Miss Kelly emphatically insisted, all through her testimony, that Appellant fired his gun within the restaurant, although ballistics evidence conclusively showed otherwise.

The United States Attorney prosecuting the case below apparently read more into his witnesses' testimony than was there. At page 435 he states that "some witnesses say that Alexander pointed his gun in a fan fashion at all of the witnesses...." The only testimony which lends even minimum credence to this belief is Lt. Marasco's statement at pages

175-6 that "(t)hey [shots] seemed to first point in my direction and I was on the left hand side of the semi-circle and then the firing seemed to proceed right around the group almost mathematically." However, any adverse implications this may have for Appellant vanish in the face of the often-mentioned conclusive evidence that Appellant did not fire his gun in the restaurant. The shots about which Lt. Marasco speaks, therefore, must have come from Murdock's gun.

In summation, the testimony of the four eyewitnesses below contain only the following unqualified assertions of the direction Appellant's gun was pointed:

.Lt. Kramer's only specific reference to the direction of Appellant's gun was that it was pointed into the chest of Lt. King. But Appellant was not charged with assault of Lt. King.

.Lt. Marasco said he coul' only remember Appellant pointing his gun at Lt. Lesnick. But Appellant was not charged with assault of Lt. Lesnick.

.Lt. LeGear said Appellant pointed the gun in the general direction of Lieutenants Kramer, Lesnick and King. But Lt. Kramer at no time specifically stated that Appellant's gun was pointed at him (Kramer).

.Miss Kelly claimed that Appellant's gun was pointed at Lt. Kramer and herself. Yet she testified just as adamantly,

in the face of conclusive evidence otherwise, that Appellant fired his gun. Her testimony, taken as a whole, indicates that she was clearly (and justifiably) rattled by the tragic occurrence and confused as to what actually took place.

In conclusion, there was absolutely no evidence introduced below to show that Appellant ever pointed his gun at Lieutenants Marasco and LeGear -- yet he was given one to three years in prison for assaulting these men -- and only the most flimsy and insufficient testimony that he pointed his pistol at Lt. Bremer or Miss Kelly -- both of whom the Court deemed to have suffered assaults vicious enough to necessitate incarcerating Appellant for four to twenty years.

(2) Appellant also contends that if an individual points a dangerous weapon at a group of persons, that is a single act and constitutes only one assault. This reasoning is in accord with that of the United States Supreme Court in Ladner v. U. S. (1958) 358 U.S. 169, 79 S.Ct. 209, 3 LEd2 199. Appellant in that case was charged with two counts of assault against a Federal officer in violation of 18 U.S.C. 111 for firing a single discharge from a shotgun into the front seat of an automobile, wounding two Federal officers inside. The Supreme Court held the defendant could be charged with only one assault since he only fired one shot, saying in part:

"(A)n interpretation that there are as many assaults committed as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act. For an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm. Thus under the meaning for which the Government contends, one who shoots and seriously wounds an officer would commit one offense punishable by ten years imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury." (at 177)

A similar hypothesis can be drawn in the case at bar. Had Appellant gone outside alone with one of the Marines, killed him during a struggle and been convicted of manslaughter he could have been sentenced to a maximum of fifteen years' imprisonment. D. C. Code (1967) 22-2405. Yet, in the facts of this case, for drawing a dangerous weapon the Government subjected Appellant to a possible forty-year prison term. Appellant was fortunate there wasn't a regiment of Marines in the Little Tavern that night; had there been he might never have gotten out of prison.

The statute under which Appellant was convicted can and should be read to support Appellant's contention. D.C. Code (1967) 22-502 states that "(e)very person convicted...of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years." It is submitted

that there can be only one reasonable meaning to this law, to wit that Congress intended to make a person using a dangerous weapon in an assault subject to ten years' imprisonment, nine years longer than simple assault (22-504), because of the act of using a dangerous weapon -- an act which was done only once in the case at bar. The manifest purpose of the law is not to give the victim revenge for being put in apprehension for his safety -- even assuming that the fear like the punishment is ten times greater when a dangerous weapon is used. The purpose of the law is to punish the aggressor for using a dangerous weapon, an act which is not multiplied by the number of objects of the aggression.

An analogy can be drawn to other offenses. It has long been settled law in the District of Columbia that where several articles, belonging to different persons are stolen at the same time and place, the stealing constitutes but one offense. It is regarded as a single act and the result of one intention. (CHAMCOCK v U.S. (1920) 50 App. D.C. 54, 267 F. 612, 11 A.L.R. 799; MCILLES v U.S. (1879) 3 MacArthur (10 D.C.) 270, 36 Am. Rep. 106; HENRY v U.S. (1919) 49 App. D.C. 207, 263 F.21 459 (embezzlement); "Larceny", Sec. 12, in 11 D. C. Code Encyclopedia 343.

The MCILLES court disapproved an earlier contrary decision in U. S. v PEERMAN (1828) 5 Cranch C.C. (5 D.C.)

412, Fed. Cas. No. 14,560, and followed the dissenting opinion of Judge Thurston in that case:

The stealing of goods, at one and the same time, although the property of different persons, is but one act of larceny and subjects the offender to but one punishment; to make it a distinct larceny for each owner of the stolen goods, is a mere technical rule...against common sense and common justice, and against the maxim of the common law, 'Nemo debet bis puniri pro uno delicto' /No man ought to be punished twice for one offense./

This rule is law not only in the District of Columbia but in the vast majority of cases where the issue has arisen or been discussed. (Anno. 28 ALR2d 1122, 1124-5, citing thirty-three jurisdictions. See also "Larceny", Section 451 in 2 Wharton's Criminal Law & Procedure 77.)

It is the Appellant's contention that the reasoning behind this rule is applicable to the case at bar, that the crime for which he has been convicted is but one act of assault subjecting him to but one punishment, and that to make it a distinct assault for each person in the restaurant is a mere technical rule against common sense and justice.

The Appellant further submits that if the Court does not accept what he feels to be the clear intent of 22-502 the statute is then, at best, open to question as to the Congressional meaning. The U. S. Supreme Court, in Pell v. U. S. (1955) 349 U.S. 81, 83, 75 S.Ct. 620, 99 LEd 905, stated, "(i)t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code

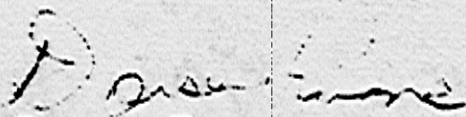
against the imposition of a harsher punishment." In that case the petitioner had transported two women on the same trip and in the same vehicle across the state line for purposes of prostitution. The Court held that this constituted only one violation of the Mann Act, since the legislative intent was not clearly otherwise.

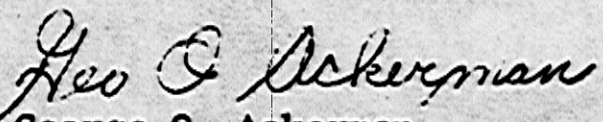
CONCLUSION

In view of the fact that no sufficient evidence was introduced at trial to show that Appellant did indeed assault Lts. Kramer, LeGear and Marasco, and Miss Kelly, that he at no time pointed his gun at them or threatened them, Appellant submits that the verdict against him was contrary to the law and facts and his conviction should therefore be reversed.

And in the alternative, in view of the fact that it would be unfair and inequitable to hold Appellant guilty of an assault with a dangerous weapon against each one of a group of persons towards which he allegedly pointed a gun, it is submitted that Appellant can be guilty of at most one assault and, therefore, his conviction on three counts of assault should be set aside.

Respectfully submitted,
EVANS & GRANT


Torsey Evans
Attorney for Appellant
Suite 711
1025 Connecticut Ave., N.W.
Washington, D. C. 20036
659-4342


George O. Ackerman
Attorney for Appellant
Suite 711
1025 Connecticut Ave., N.W.
Washington, D. C. 20036
659-4342

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 23,190

FILED NOV 12 1969

CLERK

UNITED STATES OF AMERICA, APPELLEE

v.

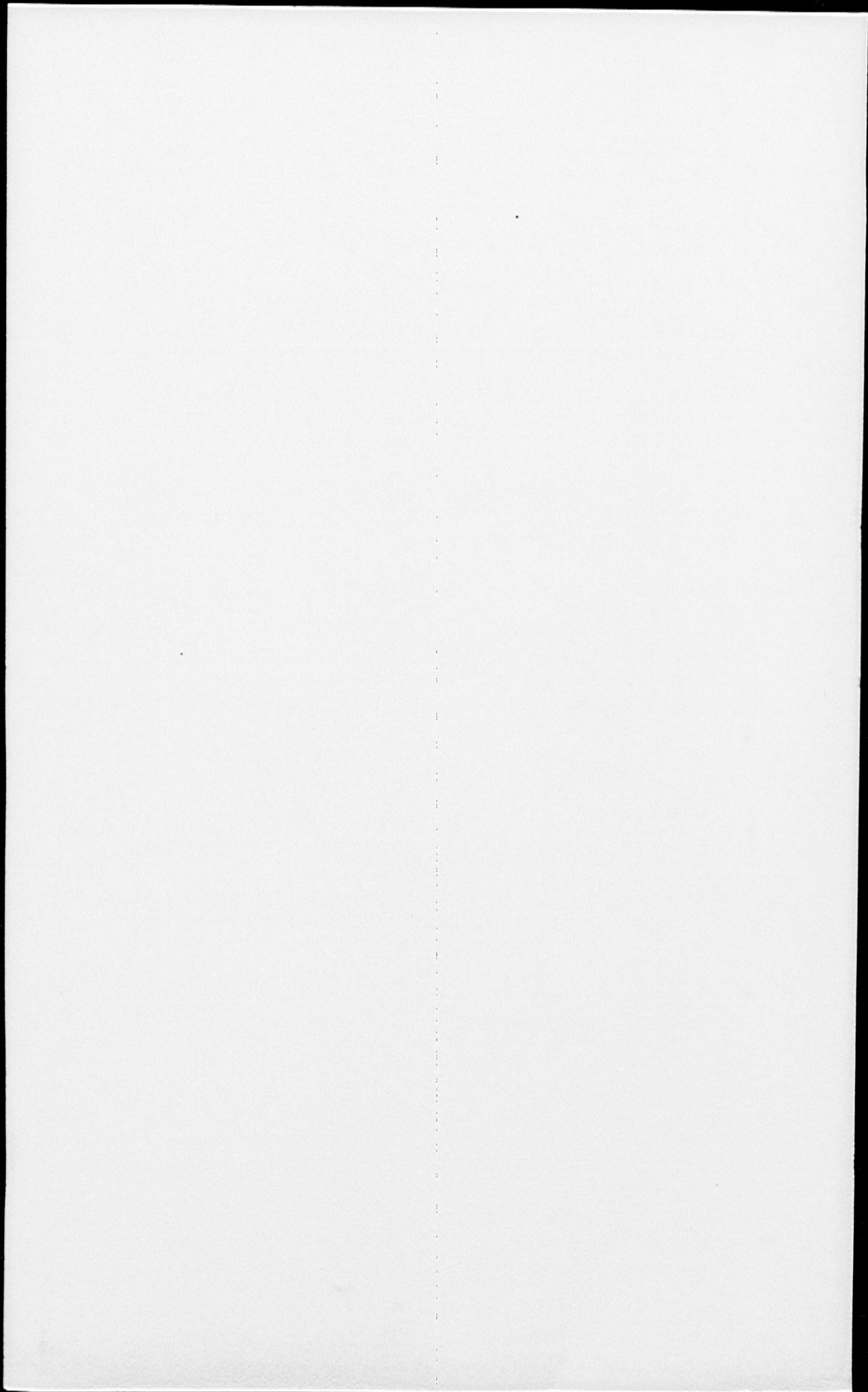
GORDON ALEXANDER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WILLIAM H. COLLINS,
GREGORY C. BRADY,
Assistant United States Attorneys.

Cr. No. 1130-68



INDEX

	Page
Counterstatement of the Case _____	1
Argument:	
I. The evidence was sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt on four counts of assault with a dangerous weapon, either as a principal or as an aider and abettor _____	8
II. The consecutive sentences imposed for the assaults of four persons with a dangerous weapon were valid _____	12
Conclusion _____	17

TABLE OF CASES

<i>Alberty v. United States</i> , 162 U.S. 499 (1896) _____	12
* <i>Barringer v. United States</i> , 130 U.S. App. D.C. 186, 399 F.2d 557 (1968), cert. denied, 393 U.S. 1057 (1969) _____	13, 14
<i>Bell v. United States</i> , 349 U.S. 81 (1955) _____	14
<i>Callanan v. United States</i> , 364 U.S. 587 (1961) _____	13
* <i>Crawford v. United States</i> , 126 U.S. App. D.C. 156, 375 F.2d 332 (1967) _____	8
* <i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947) _____	8
<i>Davenport v. United States</i> , 122 U.S. App. D.C. 344, 353 F.2d 882 (1965) _____	14
<i>Glasser v. United States</i> , 315 U.S. 60 (1942) _____	8
<i>Green v. United States</i> , 104 U.S. App. D.C. 259 F.2d 180, cert. denied, 359 U.S. 917 (1958) _____	12
<i>Guarro v. United States</i> , 99 U.S. App. D.C. 97, 237 F.2d 578 (1956) _____	13
<i>Ingram v. United States</i> , 122 U.S. App. D.C. 334, 353 F.2d 872 (1965) _____	14
<i>Irby v. United States</i> , 129 U.S. App. D.C. 17, 390 F.2d 432 (en banc 1967) _____	13
<i>Ladner v. United States</i> , 358 U.S. 169 (1959) _____	14, 15, 16
<i>Ladrey v. United States</i> , 81 U.S. App. D.C. 127, 155 F.2d 417, cert. denied, 329 U.S. 723 (1946) _____	11
* <i>Long v. United States</i> , 124 U.S. App. D.C. 14, 360 F.2d 829 (1966) _____	11
<i>Neal v. State</i> , 35 Cal.2d 11, 357 P.2d 839 (1960) _____	13
* <i>Nye and Nissen v. United States</i> , 336 U.S. 613 (1949) _____	11
<i>People v. Gaither</i> , 173 Cal. App.2d 662, 243 P.2d 799 (1959), cert. denied, 362 U.S. 991 (1960) _____	16
<i>People v. Johnson</i> , 26 Cal. Rptr. 614, 210 Cal. App. 2d 273 (1962) _____	13

II

Cases—Continued	Page
<i>People v. Plumlee</i> , 2 Cal. Rptr. 84, 177 Cal. App. 2d 224 (1960)	16
<i>Tatum v. United States</i> , 71 App. D.C. 393, 110 F.2d 555 (1940)	9
* <i>Thompson v. United States</i> , — U.S. App. D.C. —, 405 F.2d 1106 (1968)	8, 11
<i>Thompson v. United States</i> , 88 U.S. App. D.C. 235, 188 F.2d 652 (1951)	11
<i>Turberville v. United States</i> , 112 U.S. App. D.C. 400, 303 F.2d 411, cert. denied, 370 U.S. 946 (1962)	11
<i>United States v. Meyers</i> , 139 F. Supp. 724 (D. Alaska 1956)	13

OTHER REFERENCES

18 U.S.C. § 111	15
18 U.S.C. § 254	15
22 D.C. Code § 502	13
22 D.C. Code § 504	13
Junior Bar Section of D.C. Bar Ass'n, <i>Criminal Jury Instruction</i> , No. 55 (1966)	9

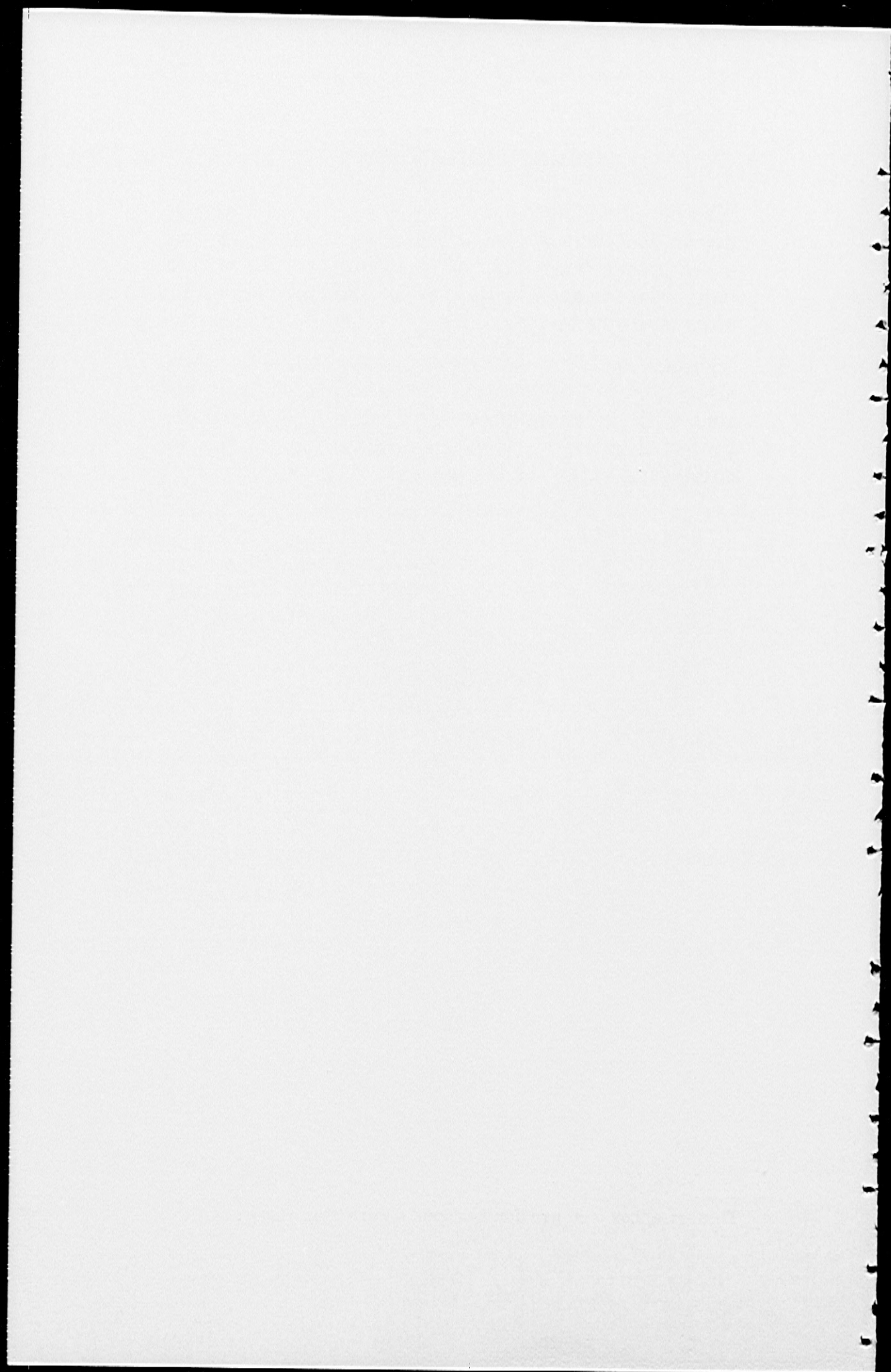
* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

- I. Whether the evidence was sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt on four counts of assault with a dangerous weapon, either as a principal or as an aider and abettor.
- II. Whether appellant was properly sentenced consecutively for the contemporaneous assaults on four persons with a dangerous weapon when he violated the protected interest which each victim had in the security and safety of his person.

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,190

UNITED STATES OF AMERICA, APPELLEE

v.

GORDON ALEXANDER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a seven-count indictment filed July 31, 1968, appellant and a co-defendant, Benjamin Murdock, were charged with two counts of first-degree murder, four counts of assault with a dangerous weapon, and carrying a dangerous weapon. At a joint trial by jury in the District Court before Judge Gesell on February 18, 19, 20, 24 and 25, 1969, the court found at the close of the Government's case that it had failed to establish the offenses of first-degree murder against either defendant and reduced those charges to two counts of second-degree murder. Appellant was found not guilty of second-degree

murder but guilty of carrying a dangerous weapon and the four counts of assault with a dangerous weapon. His co-defendant, Murdock, was found guilty of two counts of second-degree murder and the remaining counts of his indictment. Appellant was sentenced on April 11, 1969, to two to ten years each on counts three and four, the terms to run consecutively; one to three years each on counts five and six, the terms to run concurrently with each other and consecutively to the sentences imposed on counts three and four; and one year on count seven, to run concurrently with the sentence imposed on count three. This appeal followed.

On the evening of June 4, 1968, Marine Lieutenants Ellsworth Kramer, Thaddeus Lesnick, William King, Frank Marasco and Daniel LeGear attended a dinner at the United States Marine Corps Base, Quantico, Virginia, in celebration of their near-completion of basic officers' training (W. Tr. 8-9).¹ These five officers wore the formal dress white uniform, which consists of white jacket and trousers, white shoes and white hat (W. Tr. 8). At the conclusion of the dinner at about 10:30 or 11:00 p.m., they decided to travel to Washington (W. Tr. 9). Without changing from their white uniforms, they proceeded to Washington by automobile and arrived at about midnight (W. Tr. 10, 216). They first went to Groovy's, a nightclub on M Street, N.W., in Georgetown, where they remained for about one and one-half hours and had one drink each (W. Tr. 10-11). They were well-behaved and "conducted themselves like gentlemen" (W. Tr. 111, 165, 248). There they met Barbara Kelly, who was a good friend of Lt. Kramer, and she accompanied them to the apartment of another friend which was a few blocks from Groovy's (W. Tr. 11). They visited with the two young ladies who lived in this apartment until about 2:40 a.m., when the five young officers and Miss

¹ Reference to the trial transcript will be given as "W. Tr. —", "W. Supp. Tr. —" or "H. Tr. —", inasmuch as two different court reporters, Watson and Harper respectively, recorded the proceedings.

Kelly departed (W. Tr. 15, 114, 167). As they were returning Miss Kelly to Groovy's to meet a friend, they decided to stop at the Little Tavern Hamburger Shop at 33rd and M Streets, N.W. to get some coffee and sandwiches before the trip back to Quantico. The six of them entered the shop, stood by the take-out counter and ordered their food (W. Tr. 15, 120). They noticed three negro males sitting at the other end of the counter who had goatees and Afro-bush hair styles and wore gold medallions around their necks (W. Tr. 16, 18, 115-116). Their dress was "eccentric" (W. Tr. 18, 170). Appellant and his co-defendant, Murdock, were two of these men (W. Tr. 16), and Cornelius Frazier was the third² (W. Tr. 17).

After the Marine group had been in the hamburger shop for a few minutes, Lt. Kramer realized that appellant was staring at him, and he returned the stare. "[I]t was on the order of a Mexican stand-off type thing where you just keep staring at one another for an indefinite period of time" (W. Tr. 18). However, no words were exchanged between the two men, and Lt. Kramer subsequently turned and faced the counter. (W. Tr. 19, 121, 125). Shortly thereafter appellant, Murdock and Frazier got up from where they were sitting and walked to the door behind the Marines, who were all facing the counter and talking among themselves (W. Tr. 67, 171). Murdock and Frazier left the shop, but appellant stopped in the doorway (W. Tr. 19). He tapped Lt. Kramer on the shoulder, and Lt. Kramer turned around (W. Tr. 22). Then appellant reached out and poked Lt. Kramer's name tag, which was on the right front of his uniform, and said in an angry tone, "Kramer, do you want to come outside to talk about it?" (W. Tr. 23, 122, 172, 196, 223, 224). Lt. Kramer replied, "Yes," and appellant then said, "I am going to make you a Little Red Ridinghood" (W. Tr. 23, 122-

² Although Cornelius Frazier was with appellant and Murdock in the Little Tavern, he was not charged with any criminal offenses arising out of this incident.

123, 172-173, 224).³ At this time Lt. King stepped up alongside Lt. Kramer to protect him (W. Tr. 72-73, 156, 202-203) and said, "What you god-damn niggers want?" (W. Tr. 25, 174, 225). Thereupon appellant abruptly withdrew a .38 caliber revolver from his person, cocked it and pointed it at the Marines and Miss Kelly, who were all standing in a semicircle a few feet in front of him, and said, "I'll show you what I want" (W. Tr. 25, 125-127, 155, 174, 177, 226, 232). The Marines were not armed or in possession of a weapon of any type (W. Tr. 24, 130, 178, 219), and they were not advancing in any fashion towards appellant or his companions⁴ (W. Tr. 91, 134, 178, 226, 232). As the Marines and Miss Kelly "were stepping back" (W. Tr. 610), Murdock re-entered the shop with a .38 caliber revolver in his hand and suddenly began firing into their midst from a crouched position to the left and rear of appellant (W. Tr. 28, 174). Numerous shots were fired (W. Tr. 175), and the Marines and Miss Kelly fell to the floor. None of them made an effort to retaliate because they were attempting to take cover and get out of the line of fire (W. Tr. 31-32). Then appellant and Murdock withdrew from the shop, but Murdock stopped outside of the door. He stuck his arm and the gun through the door and attempted to fire the weapon several times more, but it did not fire (W. Tr. 30, 133, 228-229).⁵ Then Murdock

³ Lt. Kramer testified that he did not know what was meant by this statement at the time but it was later explained to him that this meant "they were going to bloody me . . . it meant that they were going to cut you or bleed you" (W. Tr. 69-70). However, Lt. Kramer testified he did realize that he was being threatened by appellant.

⁴ In support of the Government's contention that appellant and Murdock were not acting in self-defense, it was stipulated that the uniform jackets or tunics worn by the two deceased Marines were examined and that no gun powder residue or marks were found on either tunic (W. Tr. 409-410).

⁵ The apparent reason that Murdock's gun failed to fire again was that he had exhausted its six-shot capacity. He admitted on cross-examination that the weapon was fully loaded, and that he emptied it into the five Marines and Miss Kelly (W. Tr. 30, 589, 598).

retracted his arm and they were gone (W. Tr. 30, 229).

Lt. Kramer was wounded in the head (W. Tr. 32, 34), but he remained conscious as did Miss Kelly who had been shot in the hip (W. Tr. 32, 129). However, Lieutenants King and Lesnick were badly wounded and Lt. Kramer began mouth-to-mouth resuscitation and heart massage on Lt. King (W. Tr. 32). Lieutenants LeGear and Marasco were the only two of the group who were not shot. The latter went to Lt. Lesnick's aid, but there was nothing he could do because Lesnick "started a tremor and he died" (W. Tr. 33). Lt. King also died almost immediately from his wounds.

The Marines were not acting in a belligerent fashion or causing any disturbance prior to this incident (W. Tr. 41), and they did not strike or attempt to strike anyone in appellant's group. (W. Tr. 24, 178)

Appellant, Murdock and Frazier fled to appellant's automobile and drove off in the wrong direction on a one-way street at a high rate of speed (W. Tr. 260 S) Appellant was driving (W. Tr. 594) and as they were fleeing in the auto, Murdock fired appellant's gun three more times at the hamburger shop and at people in the street (W. Tr. 260 A-260 D, 598). They were apprehended by the police after a high speed chase and were placed under arrest (W. Tr. 260 S-260 T). The two revolvers used in the murders were recovered on the front floorboard of appellant's automobile and introduced at trial (W. Tr. 260V-260W, 598).

Federal Bureau of Investigation ballistics expert Robert Zimmers testified that in his opinion the bullets which killed Lieutenants King and Lesnick and the remaining bullets fired in the Little Tavern came from the gun identified as Murdock's (W. Tr. 395-406).⁶

At the close of the Government's case, the court ruled that its proof of premeditation and deliberation necessary to support a charge of first-degree murder as to

⁶ The bullet which struck Miss Kelly was not removed from her body (W. Tr. 130) and of course, no ballistics test was possible.

both defendants was not sufficient. Accordingly, the court reduced the counts of the indictment to second-degree murder for both men (W. Tr. 451, H. Tr. 63). Appellant's motions for judgments of acquittal on the other offenses were denied (W. Tr. 451).

Cornelius Frazier was called as a defense witness. He testified that the Marines were noisy and seemed drunk in the Little Tavern and obstructed his exit as he attempted to leave the premises (W. Tr. 480). However, he and Murdock walked around them (W. Tr. 481), and he proceeded away from the shop after he was outside (W. Tr. 482). Although Murdock was outside with him at first (W. Tr. 482), he was gone when he looked back (W. Tr. 483). Then he heard shots (W. Tr. 483) and he ran to appellant's car (W. Tr. 484). Mr. Frazier conceded on cross-examination that no one in the group of Marines struck him or a member of his party (W. Tr. 507), and they were not chased out of the hamburger shop (W. Tr. 518). He further admitted that the Marines did not have any weapons (W. Tr. 518).

Appellant elected not to testify,⁷ but his co-defendant, Murdock, testified that he came to Washington from California for the Poor People's March (W. Tr. 527). On the evening of June 4, 1968, he, appellant and Frazier were at a Southern Christian Leadership Council meeting at the Pitts Motel (W. Tr. 564-565). They proceeded to the Little Tavern afterwards to get something to eat (W. Tr. 531-532). He noticed a short time after they arrived that the Marines had entered the shop (W. Tr. 578). They were drunk and loud (W. Tr. 535-536). As he started to leave, the Marines were pointing at him and his friends, but nothing was said to any of them (W. Tr. 554). He proceeded outside with Frazier, and

⁷ The apparent reason appellant elected not to testify was a statement he made to the police after his arrest. The record indicates he told them that he and the others were in the Little Tavern for the purpose of committing a robbery. The Government chose not to use this statement in its case-in-chief, but appellant was concerned that this might be brought out on cross-examination (W. Tr. 453-464).

then he realized that appellant had not followed him out (W. Tr. 555). He returned to the shop, and as he entered he heard someone say, "Get out, you black bastards" (W. Tr. 557). He then saw the Marines advancing towards him (W. Tr. 557). Appellant was standing in front of the Marines. Murdock called to him to go, and as appellant turned around as if to leave, Murdock heard the sound of many moving feet from inside the shop (W. Tr. 558). He turned around and saw appellant with a gun, and then he pulled his gun (W. Tr. 558). He started firing his gun as one of the Marines was about one foot away from him (W. Tr. 559). He further testified that the other Marines were advancing towards him fast, and he felt they were going to kill him⁸ (W. Tr. 559).

Murdock admitted on cross-examination that he brought the pistol with him from California, that it was unlicensed, and that he had been carrying it for about two weeks for "protection" (W. Tr. 562-563, 566). None of the Marines struck him at any time (W. Tr. 580), and he and Frazier were able to leave the hamburger shop without incident (W. Tr. 581). He testified that he did not see any of the Marines doing anything to appellant (W. Tr. 585-586). He fled from the scene because he thought the Marines were chasing them (W. Tr. 596). He fired appellant's gun on the street three times because someone came out of a house with a shotgun (W. Tr. 594), but an eyewitness testified on rebuttal that there was no one on the street with a shotgun (H. Tr. 108).

Appellant renewed his motions for judgment of acquittal at the close of the defense, but they were denied (H. Tr. 78).

⁸ However, as previously stated, *supra* note 4, it was stipulated that the uniforms of both deceased officers were examined and gunpowder or burns were not present on either one (W. Tr. 409-410).

ARGUMENT

- I. The evidence was sufficient for a reasonable person to conclude that appellant was guilty beyond a reasonable doubt on four counts of assault with a dangerous weapon, either as a principal or as an aider and abettor.

(W. Tr. 30, 126-127, 129, 151, 174-176, 204, 226-227, 231-234, 239, 260S-260T, 395-406; W. Supp. Tr. 373-376; H. Tr. 69-83, 209-210.).

In ruling on a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses, weigh the evidence, and draw justifiable inferences of fact from the evidence adduced at trial. *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947). The Government is required only to introduce enough evidence so that a reasonable person *could* find guilt beyond a reasonable doubt. It is not required to introduce evidence which *compels* such a finding. *Crawford v. United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967); accord, *Thompson v. United States*, — U.S. App. D.C. —, 405 F.2d 1106, 1107 (1968). Moreover, on appeal "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942). Appellant's argument that the Government failed to present sufficient evidence to permit jury resolution of his guilt or innocence on the four counts of assault with a dangerous weapon is not supported by the record.

As part of his charge to the jury on the elements of assault with a dangerous weapon, the trial judge instructed them as follows:

In order to constitute assault with a dangerous weapon, it is not necessary that the weapon have actually been used against the person assaulted or that the person have been killed, injured, or touched.

To point a dangerous weapon at another person in a menacing or threatening manner, or in any manner that would reasonably justify the other person in believing that the weapon might be immediately used against him, constitutes an assault with a dangerous weapon (H. Tr. 209).

This is part of the standard instruction on assault with a dangerous weapon⁹ and it is consistent with existing case law. See, e.g., *Tatum v. United States*, 71 App. D.C. 393, 110 F.2d 555 (1940). The five Marine officers and Miss Kelly were standing together in a semicircle (W. Tr. 174) at a distance of about three feet to six feet from appellant at the time he stood facing them brandishing his pistol (W. Tr. 127, 151, 231-232). There is explicit testimony in the record that appellant specifically pointed his gun at Lt. Kramer and Miss Kelly. The record also substantially indicates, by implication, that he pointed the gun at Lieutenants LeGear and Marasco. Lt. Kramer testified that "they" pointed the gun at Barbara Kelly.¹⁰ Although the testimony of the firearms expert indicated that Murdock's gun was the only gun fired in the Little Tavern (W. Tr. 395-406), Miss Kelly said appellant fired at her and Lt. Kramer and that he pointed his gun in the general direction of all of them.¹¹

⁹ Junior Bar Section of D.C. Bar Ass'n, *Criminal Jury Instructions*, No. 55 (1966).

¹⁰ Q. [by the prosecutor]: Do you know whether or not either one of them pointed the gun at Barbara Kelly?

A. [by Lt. Kramer]: Yes, *they* did point the gun at Barbara Kelly. She was next to me, and she was in the line of fire (W. Tr. 30) (Emphasis added).

¹¹ Miss Kelly testified: He [appellant] raised the gun and pointed it in *our* direction and he paused for about two or three seconds and then he fired.

Q. [by the prosecutor]: All right. Now, who was he pointing at, do you remember?

A. He was pointing it in the direction of Lieutenant Kramer.

Q. All right. And at the time you say he fired the gun, who was it pointed at then?

Lt. LeGear also testified that appellant fired his weapon at them (W. Tr. 226-227, 239) and that he specifically pointed his gun at Lt. Kramer and the two Marines who were killed.¹² It was Lt. Marasco's testimony that appellant's gun was directed at all six of them as were the bullets from the discharged weapon.¹³ This evidence

¹¹ [Continued]

A. Lieutenant Kramer and myself.

Q. Did he point it at anyone else?

A. Not that I remember.

(W. Tr. 126) (Emphasis added).

Miss Kelly also testified that it was appellant who shot her:

Q. Now, did you hear some shots?

A. Yes, sir.

Q. How many, would you say?

A. Seven.

Q. All right. And were any shots directed at you?

A. The one that Alexander shot.

Q. All right. And were you hit?

A. Yes, sir.

Q. And do you recall where you were hit?

A. In the left hip. (W. Tr. 129)

¹² Q. [by the prosecutor]: Could you tell us how many people Alexander pointed his gun at?

A. [by Lt. LeGear]: Well, when he pulled it out of his coat, he pointed in the general direction of Kramer, Lesnick and King (W. Tr. 233-234).

¹³ [by defense counsel]: Now, Lieutenant, do you recall what, if anything, Mr. Alexander did with Government's Exhibit No. 3 [appellant's pistol] which was displayed in the Tavern?

A. [by Lt. Marasco]: Yes, after he pulled the gun from somewhere in either his trousers or his jacket and pointed it in *our* direction, specifically towards Lieutenant Lesnick, I don't remember what else, I didn't see any shots fired directly or not (W. Tr. 204) (Emphasis added).

The witness had testified earlier on direct examination:

Q. After the two defendants pulled these revolvers out, what happened next?

A. Well, there were no more words exchanged after Gordon Alexander's last words and the next thing I knew was that I heard a number of shots go off and I didn't exactly see who did the shooting. They seemed to first point in my direction and I was on the left hand side of the semi-circle and then the firing seemed to proceed right around the group almost mathematically (W. Tr. 175-176).

viewed in the light most favorable to the Government, clearly shows that appellant pointed his gun at the three Marines and Miss Kelly. The mere fact that they might have contradicted each other in certain respects or testified contrary to the physical evidence does not, of course, render their testimony valueless, nor does it entitle appellant to a reversal of his conviction. For as this Court has stated, "It is the function of the jury to pass on the powers of observation of [the witnesses] and [their] credibility." *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). The evidence that appellant pointed his gun at the four surviving members of the Marine party was sufficient to permit the jury to find guilt beyond a reasonable doubt, and therefore, its finding should not be disturbed.

Alternatively, the evidence below clearly establishes that appellant aided and abetted Murdock in the commission of these crimes. This evidence permits an inference of concerted criminal action and supports appellant's convictions based on aiding and abetting.¹⁴ The jury could find that appellant knowingly associated himself in some way with the criminal venture and sought by his presence or by some action to make it succeed. *Nye and Nissen v. United States*, 336 U.S. 613 (1949); *Thompson v. United States*, *supra*; *Long v. United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966); *Turberville v. United States*, 112 U.S. App. D.C. 400, 303 F.2d 411, *cert. denied*, 370 U.S. 946 (1962); *Ladrey v. United States*, 81 U.S. App. D.C. 127, 155 F.2d 417, *cert. denied*, 329 U.S. 723 (1946). The uncontroverted evidence at trial shows that appellant drew his loaded pistol, pointed it at the Marine group and accompanied this act with threatening words. Thereafter Murdock appeared and gunned down the three Marines and Miss Kelly.

¹⁴ This was essentially the trial court's basis for permitting the case against appellant to go to the jury (H. Tr. 69-83). Accordingly, the court instructed the jury on aiding and abetting in second degree murder and assault with a dangerous weapon (H. Tr. 209, 210). The jury's consideration of this legal theory is evidenced by their request that the court repeat this instruction which the court did (W. Supp. Tr. 373-376).

Certainly the jury could reasonably infer from appellant's behavior that he was either inciting or assisting the actual criminal conduct that resulted.¹⁵

There is, moreover, appellant's immediate flight with Murdock after the shooting that the jury could properly consider as a factor supporting appellant's guilty involvement. *Alberty v. United States*, 162 U.S. 499, 510 (1896); *Green v. United States*, 104 U.S. App. D.C., 23, 259 F.2d 180, cert. denied, 359 U.S. 917 (1958). Appellant did not attempt to run away from Murdock or to disassociate himself from him; rather, they ran together to appellant's automobile, in which they were later captured after a high-speed chase with appellant driving (W. Tr. 260S-260T).

Appellee submits, therefore, that the evidence of appellant's guilt, either as a principal or as an aider and abettor, was sufficient to warrant submission of the case to the jury and to support the jury's eventual verdict. Accordingly, his conviction should stand unaltered.

II. The consecutive sentences imposed for the assaults of four persons with a dangerous weapon were valid.

There was no error in imposing consecutive sentences for the assaults upon the members of the Marine group.¹⁶

¹⁵ In denying appellant's motions for a judgment of acquittal at the conclusion of the case, the trial court stated to appellant's counsel:

"It is not necessary for the aiding and abetting charge to be given that there be an advanced agreement or plan. You don't even have to be together to aid and abet as you well know, sir. I think the difference between us is that I find in Alexander's conduct alone viewing it by itself, conduct which indicated that he had intent to commit the crime, that he participated in it in a way wishing to bring it about, he took action that helped to make it succeed, because clearly he held at least one marine at bay, and that obviously when he pulled a loaded revolver in that context, he knew that was criminal conduct" (H. Tr. 75).

¹⁶ Appellant was sentenced to two to ten years for assaults with a dangerous weapon on Lt. Kramer and Miss Kelly, the terms to run consecutively; one to three years for assaults with a dangerous weapon on Lieutenants LeGear and Marasco, the terms to run concurrently but consecutively to the first two terms; and one year

Assault with a dangerous weapon is an offense against the security and safety of the person. The words of the basic assault statute indicate the legislative intent as to the appropriate unit of prosecution—the assault of each person is a separate and distinct offense.¹⁷ An assault of four persons with a dangerous weapon occasions four times the social harm sought to be protected against as an assault with a dangerous weapon on a single individual.¹⁸ For this reason there should be little doubt that Congress intended the permissibility of a multiple penalty to correspond with a multiple harm.¹⁹ In *Barringer v. United States*, *supra*, note 18, this Court held that con-

for carrying a dangerous weapon, the term to run concurrently with the above. This amounts to a total sentence of five to twenty-three years.

¹⁷ Title 22, D.C. Code, § 504 provides: "Whoever unlawfully assaults, or threatens *another* in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both." (Emphasis added.) The assault contemplated by this statute is a common-law assault, which is defined as "an attempt with force or violence to do a corporal injury to *another*; and [it] may consist of any act tending to such corporal injury . . ." (Emphasis added.) *Guarro v. United States*, 99 U.S. App. D.C. 97, 99, 237 F.2d 578, 580 (1956). The statute in the instant case, 22 D.C. Code § 502, merely provides a greater punishment for perpetrating an assault by means of a dangerous weapon.

¹⁸ See, e.g., *Barringer v. United States*, 130 U.S. App. D.C. 186, 399 F.2d 557 (1968), *cert. denied*, 393 U.S. 1057 (1969) (consecutive sentences upheld by this Court for robbing two persons at the same time and place); *United States v. Meyers*, 139 F. Supp. 724 (D. Alaska 1956) (consecutive sentences upheld for contributing to the delinquency of two minors at the same time and place); *Neal v. State*, 35 Cal. 2d 11, 357 P.2d 839 (1960) (where gasoline was thrown into the bedroom of a married couple and ignited, consecutive sentences for two counts of attempted murder were upheld in an opinion by Traynor, J.); *People v. Johnson*, 26 Cal. Rptr. 614, 210 Cal. App. 2d 273 (1962) (consecutive sentences upheld for robbing more than one person at the same time and place).

¹⁹ The so-called "rule of lenity" only comes into play at the end of the analysis "where there is substantial doubt as to whether Congress would have intended . . . [multiple punishment] to be imposed." *Irby v. United States*, 129 U.S. App. D.C. 17, 18, 390 F.2d 432, 433 (*en banc* 1967); see *Callanan v. United States*, 364 U.S. 587, 596 (1961).

secutive sentences could be imposed for the robbery of two persons at the same time and place because the robbery statute was designed to safeguard individual citizens from being robbed. Since it is likewise the congressional intent of the several statutes proscribing various kinds of assault to protect individual citizens from being assaulted, the imposition of consecutive sentences for multiple assaults is proper.

Bell v. United States, 349 U.S. 81 (1955), which is cited by appellant, is clearly distinguishable from the instant case. In *Bell*, consecutive sentences were held improperly imposed on two counts of violation of the Mann Act, each count involving a different woman transported on the same trip in the same vehicle. As this Court has observed, the Supreme Court was uncertain in *Bell* as to "whether the principal design of the Mann Act was to protect each woman carried across state lines, or rather to strike generally at the business of white slave trading and in particular at its use of interstate transportation facilities." *Barringer v. United States*, *supra*, 130 U.S. App. D.C. at 186, 399 F.2d at 558. The assault with a dangerous weapon statute here contemplates the protection of the individual victim and there were four separate victims in this case. Appellee does not perceive the applicability here of the principles enunciated by this Court in *Ingram v. United States*, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965), and *Davenport v. United States*, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965). *Ingram* struck down consecutive sentences for assault with a dangerous weapon and assault with intent to kill arising out of a single assault; and *Davenport* invalidated consecutive sentences for manslaughter and assault with a dangerous weapon, again the result of a single shooting. In these cases a single act violated a single interest, the security of a single person.

Appellant contends that *Ladner v. United States*, 358 U.S. 169 (1958), is controlling in the instant case. In *Ladner* a single shotgun blast by the defendant wounded two federal officers who were performing a common duty.

Ladner was given consecutive sentences under 18 U.S.C. § 254.²⁰ However, the Supreme Court ruled that the single discharge of a shotgun constituted only a single violation of the statute. The Court stated that it was not clear whether the congressional intent underlying the statute was to protect individual federal officers or to "prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests" ²¹ *Ladner, supra*, 358 U.S. at 176. Since there existed an ambiguity as to the meaning of the statute, the Court applied the "rule of lenity" and adopted the less harsh of the two meanings.

Appellee submits that *Ladner* is distinguishable from the present case because the societal design of 18 U.S.C. § 254 was "to further the legitimate purposes of the Federal government," 358 U.S. at 175, by proscribing conduct that would impede performance of a task by federal officers. This was the interest sought to be protected by the statute. Since the defendant in *Ladner*

²⁰ 18 U.S.C. § 254 (1940 ed.) presently recodified as 18 U.S.C. § 111, provided:

Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person . . . [if he is a federal officer designated in another section] while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be . . . imprisoned not more than three years . . . and whoever in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be . . . imprisoned not more than ten years.

The defendant in *Ladner* was sentenced to two consecutive terms of ten years each under the "dangerous weapon" provision of the statute. 358 U.S. at 171.

²¹ The Government contended:

"The legislation was aimed at protecting federal officers, not only to promote the orderly functioning of the federal government (whose efficiency would diminish in proportion to the number of individual officers affected), but also to protect the individual officers, as 'wards' of the federal government from personal harm. Both of these legislative objectives make the individual officers a separate unit of protection." *Ladner, supra*, 358 U.S. at 174, quoting from the Government's brief.

hindered the completion of only *one* federal task²² by his conduct, he was guilty of only *one* violation of the statute despite the fact that he wounded two officers by so doing.²³ The statute in the instant case is not so designed because its sole purpose is the protection of individual persons. An intrusion on the security or safety of an individual, therefore, is the proper unit of prosecution.²⁴ Accordingly, the imposition of consecutive sentences was valid.²⁵

²² The two federal officers were wounded while in the front seat of an automobile as they were transporting an arrested prisoner.

²³ In *Ladner*, the Court stated that "the Government frankly conceded on the oral argument that assault can be treated no differently from the other outlawed activities [of resisting, opposing, impeding, intimidating, a federal officer] and that if a single act of hindrance which has an impact on two officers is only one offense when the act is not an assault, an act of assault can be only one offense even though it has an impact on two officers." *Ladner, supra*, 358 U.S. at 176-177. However, the Court in *Ladner* indicated that had the defendant fired two shots at the two federal officers, he might have been properly convicted of more than one offense and therefore, the case was remanded for such a hearing in the District Court. 358 U.S. at 178 n.6.

²⁴ Moreover, the results of such an interpretation are not incongruous. Appellant committed four separate assaults with a deadly weapon as either a principal or an aider and abettor. If he had committed four separate offenses of second-degree murder, he would have been liable to a minimum of four twenty-year sentences totaling eighty years.

²⁵ Finally, appellant attempts to draw an analogy between the instant case and those cases purporting to hold that larceny of several articles belonging to different persons at the same time and place is but one offense. However, the cases are not analogous because an assault is a crime against the safety and security of the person and larceny is merely a crime against property. Crimes against the person are of greater social harm and hence deserving of greater punishment. *E.g., People v. Gaither*, 173 Cal. App. 2d 662, 343 P.2d 799 (1959), *cert. denied*, 362 U.S. 991 (1960); *People v. Plumlee*, 2 Cal. Rptr. 84, 177 Cal. App. 2d 224 (1960).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WILLIAM H. COLLINS,
GREGORY C. BRADY,
Assistant United States Attorneys.